

**FOLEY
HOAG** LLP
ATTORNEYS AT LAW

August 28, 2003

Mary Beth Gentleman
Boston Office
617-832-1199
mgentleman@foleyhoag.com

By Hand

Ms. Mary L. Cottrell
Secretary
Department of Telecommunications & Energy
One South Station
Boston, MA 02110

Re: USGen New England, Inc.
Petition for Zoning Exemption

Dear Ms. Cottrell:

On behalf of USGen New England, Inc. ("USGenNE" or "Company"), I enclose an original and five (5) copies of a Petition for Zoning Exemption pursuant to G.L. c. 40A, § 3 and Motion to Defer Consideration of Request for Exemption from Site Plan Review with respect to an emissions control project at Salem Harbor Station. The Petition includes substantial information regarding the development and design of the Project relevant to the Department's review of this request for a zoning exemption.

As set forth in the Petition, USGenNE submits that the zoning exemption should be granted by the Department, and that the Department should find that the proposed use of the land for construction and operation of the emissions control project is reasonably necessary for the convenience and welfare of the public.

In addition to the Petition, I enclose the following documents for docketing in this matter:

- a Memorandum of Law in Support of USGen New England, Inc.'s Petition for Zoning Exemption Pursuant to G.L. c. 40A, § 3;
- USGenNE's Request for Site Plan Approval filed today with the Planning Board of the City of Salem;
- the zoning exemptions checklist provided by the Department, signed by Michael Fitzgerald, Station Manager of Salem Harbor Station;
- a draft hearing notice;

Ms. Mary L. Cottrell
August 28, 2003
Page 2

- one copy of the City of Salem Zoning Ordinance effective as of this date, bearing an original attestation by the City of Salem Town Clerk; and
- a check in the amount of One Hundred Dollars (\$100) for the filing fee for this petition.

Prior to the public hearing in this matter, USGenNE will have completed a variety of visual simulations of the proposed Project compared to existing views. The Company will file them with the Department before the hearing, and will include them in its presentation at the hearing. In addition, the Company is still in the process of preparing a Traffic Management Plan in consultation with local officials in Salem, and will also file that proposed Plan before the public hearing.

Kindly date stamp the enclosed copy of this letter, and return same to our messenger.

Thank you for your attention to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mary Beth Gentleman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Mary Beth Gentleman

MBG:jrd
Enclosures

cc: Mr. Michael Fitzgerald
Mr. Louis Arak
Sanford L. Hartman, Esquire
Joseph W. Rogers, Asst. Attorney General
ACO Parties

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

_____)
Petition for Zoning Exemption Pursuant to)
G.L. c. 40A, § 3 for Salem Harbor Station's)
310 CMR 7.29 Emissions Control)
Project)
_____)

D.T.E. 03-____

**MEMORANDUM OF LAW IN SUPPORT OF USGEN NEW ENGLAND, INC.'S
PETITION FOR ZONING EXEMPTION PURSUANT TO G.L. c. 40A, § 3**

I. INTRODUCTION

In its Petition for Zoning Exemption Pursuant to G.L. c. 40A, § 3 and Motion to Defer Request for Exemption from Site Plan Review (the "Petition") which accompanies this Memorandum of Law, USGen New England, Inc. ("USGenNE") requests a comprehensive exemption from the operation of the Zoning Ordinance of the City of Salem with respect to the construction and use of an Emission Control Plan ("ECP") project (the "Project") proposed for Salem Harbor Station ("Salem Harbor").¹ For the reasons set forth in this Memorandum, USGenNE submits that it qualifies as a public service corporation ("PSC") under G.L. c. 40A, § 3.

¹ Salem Harbor is owned by USGenNE, and is managed and operated by subsidiaries of PG&E National Energy Group, Inc. ("PG&E NEG"). Where this Petition refers to USGenNE "managing and operating Salem Harbor," or words similar thereto, it is understood that such functions are performed by these subsidiaries. USGenNE filed a voluntary petition for bankruptcy in July 2003, and is operating Salem Harbor as a debtor in possession.

II. STANDARD OF REVIEW

The term “public service corporation” is not defined in Chapter 40A or elsewhere in the General Laws. In determining whether a petitioner qualifies as a PSC for the purposes of G.L. c. 40A, § 3, the Supreme Judicial Court (“SJC”) has stated that “among the pertinent considerations” are: (i) “whether the corporation is organized pursuant to an appropriate franchise from the state to provide for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business;” (ii) “whether the corporation is subject to the requisite degree of governmental control and regulation;” and (iii) “the nature of the public benefit to be derived from the service provided.” *Save the Bay, Inc. v. Department of Public Utilities*, 366 Mass. 667, 680 (1975); *see also Commonwealth Electric Company*, D.T.E. 03-7, at 3-4, (2003); *Tennessee Gas Pipeline Company*, D.T.E. 01-57, at 3-4, (2002). While the *Save the Bay* considerations remain the guiding principles by which corporations seeking PSC status are judged, the SJC has resisted efforts to impose a strict definition of what constitutes a PSC. *See Planning Board of Braintree v. Department of Public Utilities*, 420 Mass. 22, 26 (1995) (characterizing a “public service corporation” as a “term of art”). Similarly, the Department of Telecommunications and Energy (“DTE” or the “Department”) has interpreted the “pertinent considerations” in *Save the Bay* as “a flexible set of criteria which allow the Department to respond to changes in the environment in which the industries it regulates operate and still provide for the welfare of the public.” *Berkshire Power Development, Inc.*, D.P.U. 96-104, at 30 (1997) (“*Berkshire Power*”); *see also Dispatch Communications of New England d/b/a Nextel Communications, Inc.*, D.P.U./D.T.E. 95-59-B/95-80/95-112/96-113, at 6 (1998) (“*Nextel*”).

III. USGENNE, AS THE OWNER OF SALEM HARBOR, SATISFIES THE “PROVIDES A NECESSITY” TEST OF *SAVE THE BAY*

A. USGenNE, as the owner of Salem Harbor, provides a public necessity pursuant to an appropriate franchise.

The first consideration under *Save the Bay* is whether an entity operates pursuant to an appropriate franchise to provide for a necessity or convenience to the general public. The SJC and the Department have interpreted this consideration broadly to include a variety of companies that share one common characteristic -- they meet a demonstrated public need. *See Berkshire Power* at 28-9 (because “the term ‘public service corporations’ has no statutory definition,” the Department “look[s] to the rest of the statute which states that a PSC provides a product or service that is ‘reasonably necessary for the convenience or welfare of the public.’”) For example, a PSC need not be organized under G.L. c. 164.² *See Save the Bay*, 366 Mass. at 680-681 (LNG company was PSC even though not organized under G.L. c. 164). Further, a PSC need not have an assigned geographic area in which it is required to provide service, *i.e.*, a service territory. *See id.* A PSC also need not have eminent domain authority.³ *See Truro v. Department of Public Utilities*, 365 Mass. 407, 408 (1974); *Wenham v. Department of Public Utilities*, 333 Mass. 15, 16-17 (1955). In fact, a public service corporation need not be a corporation at all. *Planning Board of Braintree*, 420 Mass. at 27 (upholding DPU decision granting PSC status to a municipal light department created by statute); *Truro*, 365 Mass. at 410 (“...service involved in this case could lawfully be provided by an individual or a partnership rather than a corporation.”). Moreover, a PSC need not have regulated rates. *Cf. Weld v. Gas &*

² USGenNE is a Delaware corporation, qualified to do business in Massachusetts. It is not organized under G.L. c. 164.

³ However, as a wholesale generation company, USGenNE can exercise the power of eminent domain, with the approval of the Department, with respect to facilities subject to the jurisdiction of the Energy Facilities Siting Board. *See* G.L. c. 164, § 69R.

Light Commisioners, 197 Mass. 556, 559 (1908)(“In reference to *some* kinds of public service, and under some conditions, it is thought by many that regulation by the state is better than competition.”)(emphasis supplied).

Instead of concentrating on the kind of “franchise” under which a petitioner operates, the SJC and the Department have focused on whether the entity meets a demonstrated public need.⁴ *See, e.g., Save the Bay*, 366 Mass. at 681; *Berkshire Power* at 31. For example, in *Save the Bay*, the Court concluded that, where the Department of Public Utilities had specifically found a public need for an increased supply of natural gas, a facility which would meet that public need would qualify as a PSC, notwithstanding the fact that it was not a corporation organized under G.L. c. 164. As the Court explained:

The Department specifically found a public need for an increased supply of natural gas in Massachusetts and New England. It noted that the two pipeline companies supplying the New England area have not been able to meet the increased demands of the utilities. As the proposed facility would be equipped to liquefy and store natural gas collected in summer months for transportation and sale in the peak demand periods of the winter, the Department found that the facility would be providing a service sufficient to qualify it as a ‘public service corporation.’

Save the Bay, 366 Mass. at 681; *see also Yankee Celltell*, D.P.U. 84-72, at 3 (1984) (DPU concurred with FCC’s finding that there was “an immediate public need for cellular radio” and, therefore, granted the company the authority to serve customers in the Commonwealth).

As was the case with the LNG company determined to be a PSC in *Save the Bay*, here USGenNE meets a demonstrated public need for a reliable source of electric power -- “a

⁴ Indeed, a recent Department decision suggests that companies like USGenNE, which operate in a restructured electricity market, need not demonstrate that they operate pursuant to an “appropriate franchise” in order to qualify for PSC status. According to the Department, whether or not a company which operates in a restructured market does so pursuant to an “appropriate franchise” is of only “limited value” in determining whether that entity qualifies as a PSC. *See Berkshire Power* at 31. Instead, the Department focuses on whether the entity “provide[s] for a necessity or convenience to the general public which could not be furnished through the ordinary channels of private business.” *Berkshire Power* at 31 (quoting *Save the Bay*, 366 Mass. at 680); *see also Nextel* at n. 13.

necessity in the society in which we live,” *Berkshire Power* at 33 -- which, under the facts of this case and as more fully explained below, cannot be satisfied by other providers at this time. As such, USGenNE, in its capacity as the owner of Salem Harbor, falls easily within the category of corporations which have satisfied the first prong of the *Save the Bay* test.

In providing a necessity to the public, USGenNE operates pursuant to a directive from the ISO, which, as the entity which oversees the operation of NEPOOL⁵, has directed USGenNE to keep Salem Harbor operational. In accordance with the procedures under Rule 18.4 of the Restated NEPOOL Agreement (“RNA”), USGenNE applied to the ISO to cease operations at each of the Salem Harbor units. The ISO, after assessing the impact of such closures on the NEPOOL System, concluded that the retirement of the Salem Harbor units would have “a significant adverse affect on the reliability of the NEPOOL System” as a whole and on the North Shore load area in particular. *See* Letter of Mr. Stephen G. Whitley, ISO New England, to Mr. Philip C. Smith, PG&E National Energy Group, July 22, 2003, at 1 (the “18.4 Determination”), attached to Petition as Appendix 13; Final Report, Reliability Assessment of Proposed Retirement of Mystic 4-6, New Boston 1, and Salem Harbor 1-4, July 9, 2003 (the “Final Report”), at 13-17, attached to Petition as Appendix 14. Given these findings, the ISO rejected USGenNE’s applications to retire the units. *See* Petition, Appendix 13 at 1.

For the purposes of demonstrating that USGenNE meets the criteria for a PSC, the fact that this determination of need was made by the ISO rather than some administrative agency of the Commonwealth or of the Federal government is a distinction without a difference. As the

⁵ On July 25, 1997, FERC conditionally authorized the establishment of the ISO and the transfer to the ISO of control over New England’s bulk power system. *See New England Power Pool*, 79 FERC ¶ 61,374 (1997), *reh’g denied*, 85 FERC ¶ 61,242 (1998). On August 8, 2003, the NEPOOL Participants Committee filed with the FERC an amendment to extend until December 31, 2004, the agreement with the ISO. *See New England Power Pool*, FERC Docket No. ER03-1181-000 (Notice of Filing, August 14, 2003).

Department is well aware, under the current configuration of the bulk power system serving New England, the ISO, subject to review by the FERC, has the initial responsibility for determining whether the public convenience and necessity requires the operation of particular generation facilities and, if so, the terms under which those services are to be provided. *See* Letter of Commissioners, Massachusetts Department of Telecommunications and Energy, to Gordon van Welie, ISO New England, July 14, 2003, at 4 (“ISO-NE will determine whether implementation of the Company’s plan will have a significant adverse effect upon the reliability or operating characteristics of its system...”); *New England Power Pool*, 101 FERC ¶ 61,344, p. 12 (2002) (“ISO-NE has the authority to negotiate such agreements as are needed for system reliability . . . [and] these agreements will be filed with the Commission . . .”); *Devon Power*, 103 FERC ¶ 61,082 (2003) (FERC review of agreement proposed after ISO determination that continued operation of units in question was required for reliability). For all practical purposes, then, given the integral role that the FERC will play in the implementation of the ISO’s determination and directive, this determination and directive should be accorded the same consideration as one made by the FERC itself.

In its capacity as administrator of the bulk power system in New England, the ISO has determined that “all of the Salem Harbor units are required for NEPOOL System reliability until vital transmission improvements in the North Shore and Boston Import areas are completed.” *See* Petition, Appendix 13 at 1. It is difficult to imagine a more express determination of public convenience and necessity.

B. USGenNE, as the owner of Salem Harbor, provides a public necessity not otherwise available through the ordinary channels of private business.

It is clear that USGenNE, as the owner of Salem Harbor, is providing a necessity to the public which is not otherwise available through the ordinary channels of private business. As the Department has explained, “[e]lectricity is a product that is delivered through an integrated generation, transmission and distribution system” and, thus, “the provision of electricity over such an integrated and regulated system is not comparable to the furnishing of a product through the ordinary channels of private business.” *Berkshire Power* at 32; *see also Nextel* at 21 (finding that an effective and uninterrupted wireless communication network delivered through an integrated and regulated network cannot be effectively established through the ordinary channels of private business).

To determine whether an entity operates through the ordinary channels of private business, the Department has looked to whether it has an “obligation to serve.” *See Nextel* at 20. As the Department explained in *Nextel*: “Private businesses generally do not operate under an obligation, and therefore, the ‘ordinary channels of private business’ would necessarily require the absence of any type of obligation to serve.” *Id.* Although USGenNE’s “obligation to serve” is not the same as that imposed on an “electric company” or a “gas company,”⁶ there can be no doubt but that it is subject to an obligation to serve with respect to its Salem Harbor plant. USGenNE has proposed to discontinue operation of Salem Harbor but, as a result of the ISO New England’s 18.4 Determination, it has been required to continue operating Salem Harbor in

⁶ Traditionally, electric utilities have an obligation to provide the service required by all customers, new and old, within their service territories; whereas, the obligation to serve for gas utilities has, in light of the availability of alternative fuel sources, been limited to their existing customers. *See Berkshire Gas Company*, D.P.U. 98-22 at 6 (1995). While the Department has recognized that these obligations may evolve with the development of competitive markets for electric and gas supplies, that evolution is dependent upon the development of competitive options. *See Unbundling Of All Natural Gas Local Distribution Companies’ Services*, D.T.E. 98-32-B, at 4-9 (1999). But in any event, Salem Harbor’s obligation to serve here is based on its obligations under the RNA.

order to maintain reliability in the Boston Import Area.⁷ Its obligation to serve with respect to Salem Harbor -- to continue to stand ready to operate -- is both very real and very direct. Therefore, USGenNE's Salem Harbor facility provides a necessity that, for the time being, cannot be furnished through the ordinary channels of private business.

In applying to the ISO for permission to close Salem Harbor, USGenNE sought to exercise an option typically available to private businesses, namely, the right to make operational decisions based on purely economic considerations.⁸ In denying USGenNE's application, the ISO made clear the fact that USGenNE has a duty to keep Salem Harbor operational, and eliminated any notion it had of being a "private business" operating through "ordinary channels."

IV. AS THE OWNER OF SALEM HARBOR, USGENNE IS SUBJECT TO A SUBSTANTIAL DEGREE OF GOVERNMENT CONTROL

As the Department has explained, "neither the statute nor Court decisions have identified what level of governmental control and regulation is required" to satisfy the "governmental control criterion." *Berkshire Power* at 34. The necessary control may be satisfied by governmental authority imposed at either or both the federal and state level. *See, e.g., Save the Bay*, 366 Mass. at 682-683 (PSC within the regulatory jurisdiction of both the Federal Power Commission and the Department); *Nextel* at 27 (PSC within the regulatory jurisdiction of the Federal Communications Commission). In demonstrating the "requisite degree of governmental regulation and control," a petitioner need not meet any particular "minimum requirements," nor demonstrate any specific type of regulatory oversight. *See Berkshire Power* at 34; *Nextel* at 27-28. Rather, the Department looks to "key aspects of an entity's operations which, if regulated,

⁷ The Boston Import Area includes the North Shore load area.

⁸ Indeed, the mere fact that USGenNE needs permission from ISO to close Salem Harbor is indicative of the extent to which USGenNE does not operate through the ordinary channels of private business.

might be appropriate to consider in determining whether the entity possesses the characteristics of a PSC.” *Nextel* at 28. To this end, the Department has found that regulation of a corporation’s “entry, siting, rates and tariffs” were relevant to this inquiry. *Id.*; *see also Berkshire Power* at 34. As explained below, USGenNE is subject to significant regulatory oversight at the state and federal level which satisfies the second prong of the *Save the Bay* test.

First, USGenNE is a wholesale generation company as defined in G.L. c. 164, § 1. D.P.U. 98-20 *Petition of USGen New England, Inc. Requesting an Advisory Ruling by the Department of Telecommunications and Energy, pursuant to 220 C.M.R. § 2.08(1)*, April 8, 1998 (“*Advisory Ruling*”). As the Department recognized in its Advisory Ruling, “the price and terms of wholesale generation transactions are regulated by the Federal Regulatory Energy Commission.” *Advisory Ruling* at 7, n.11.⁹

Second, USGenNE is a “public utility” under the terms of the Federal Power Act. 16 U.S.C. § 824(e). *New England Power Company*, 82 FERC ¶ 61,179, p. 13 (1998)(“upon acceptance of its rate schedules, USGenNE will become a public utility and subject to FERC jurisdiction”). While USGenNE has been determined to be an exempt wholesale generator, *USGen New England*, 84 FERC ¶ 62,126 (1998), and has been granted authority to charge market-based rates, *New England Power Company*, 82 FERC ¶ 61,179, its rates are nonetheless subject to the exclusive oversight of FERC. *See Order Seeking Comments On Proposed Revisions To Market-Based Rate Tariffs And Authorizations*, 103 FERC ¶ 61,349 (2003); 16 U.S.C. § 824m (limitation on rates of exempt wholesale generators). Further, USGenNE is a member of NEPOOL, which falls under FERC’s jurisdiction. The Department has previously

⁹ For that reason, the Massachusetts Legislature limited the Department’s jurisdiction over a wholesale generation company to those requirements expressly provided in G.L. c. 164, §§ 1, 1A(e), 69R, 96, and 125A, or where a wholesale generation company applies for siting approval under §§ 69G to 69Q. *See Advisory Ruling* at 7.

found that membership in NEPOOL is indicative of regulatory control over a corporation. *See Berkshire Power* at 35; *Braintree Elec. Light Department*, D.P.U. 90-263, at 38 (1991).¹⁰

Accordingly, USGenNE submits that it is subject to the “requisite degree of government regulation and control” such that it satisfies the second “pertinent consideration” of *Save the Bay*.

V. THE CONSTRUCTION OF THE ECP PROJECT AT SALEM HARBOR WILL PROVIDE A SUBSTANTIAL PUBLIC BENEFIT

In considering the third criterion in *Save the Bay*, the SJC and the Department have looked to the value of the service provided to the public by the entity seeking PSC status. *See Berkshire Power* at 35 (“The nature of the public benefit that is derived from the generation of electricity is not dependent on the vertical integration of the electric industry, or on the corporate structure of the generator; rather, it stems from the needs of the electricity consumer.”); *Nextel* at 34 (affirming analysis in *Berkshire Power*). An exemption from G.L. c. 40A, § 3 will be granted to a corporation satisfying a demonstrated public need or discharging a public duty and thereby creating a public benefit. *See Save the Bay*, 366 Mass. at 681-683; *Mezitt v. Department of Public Utilities*, 354 Mass. 692, 693 (1968) (LNG company’s construction of a plant for liquefying natural gas would meet a public need); *Planning Board of Braintree*, 420 Mass at 27-28 (municipal and private utilities have a duty to serve the public and must have the tools available to perform their duty, including G.L. c. 40A, § 3.)

In assessing the impact of the retirement of Salem Harbor, the ISO made clear that there was a public need for stability and reliability in the NEPOOL System which could only be satisfied by the continued operation of Salem Harbor. *See* Petition, Appendix 13 at 1. Indeed,

¹⁰ This case does not present any issues with respect to the interplay of the Federal Power Act and the Federal Bankruptcy Act. *See, e.g., Vermont Public Power Supply Authority v. PG&E Energy Trading, et al.*, 104 FERC ¶ 61,185 (2003).

Salem Harbor's importance to reliability on the North Shore is particularly great, as "the retirement of any [Salem Harbor] unit will immediately create significant deficiencies that worsen over time." Petition, Appendix 14 at 17. Salem Harbor's continued operation is also crucial for the Boston Import Area, which includes Downtown Boston, in terms of ensuring both generation resource adequacy, which determines the Loss of Load Expectation ("LOLE"), and in guaranteeing sufficient operating reserve capacity. As the ISO explained, "the retirement of Salem Harbor 1-4 also makes the LOLE unacceptable for 2003 and 2008 and beyond. . . . [and] retiring Salem Harbor would cause an operating reserve deficiency starting in 2006 and the deficiency would gradually increase over time." *See* Petition, Appendix 14 at 13-14.

Construction of the Project at Salem Harbor will enable USGenNE to keep Salem Harbor fully operational, thereby satisfying the public need for reliability and stability in the supply of electricity for customers in the Boston Import Area. The Project is a means by which USGenNE can comply with both the 7.29 Regulations and ISO's directive to keep Salem Harbor in operation. Accordingly, through the implementation of the ECP Project, USGenNE will provide the public with a substantial benefit which qualifies it for PSC status.

Implementation of the ECP Project will produce additional benefits beyond reliability. First, the Project will substantially reduce emissions of NO_x and SO₂. Potential NO_x emissions will be reduced by almost 2,700 tons per year ("TPY") and potential SO₂ emissions will be reduced by almost 7,100 TPY. Second, reductions in off-site emissions of CO₂ will also occur. (*See* Petition, Appendix 2 for a detailed description of the environmental benefits of the Project.) Finally, the Project will preserve a portion of the Commonwealth's fuel diversity by allowing one of its last coal plants to continue to operate.

VI. CONCLUSION

Based on the foregoing, USGenNE submits that it qualifies under G.L. c. 40A, § 3 as a public service corporation with respect to its ownership and operation of Salem Harbor. Its continued operation of Salem Harbor provides a necessary power supply and grid stability for the North Shore and Greater Boston not otherwise available through the ordinary channels of private business. Salem Harbor's operations are subject to substantial regulation by the ISO and by government agencies. Finally, the Project provides important public benefits by preserving the ability of Salem Harbor to operate lawfully under both the 7.29 Regulations and the 18.4 Determination, reducing air emissions, and preserving a slice of fuel diversity in the Commonwealth's energy mix.

Respectfully submitted,

USGEN NEW ENGLAND, INC.

By its attorneys,



Mary Beth Gentleman
George Dean
Susan Snyder
Foley Hoag LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600

Dated: August 28, 2003

USGenNE's Request for Site Plan Approval

filed with the

Planning Board of the City of Salem

(copy to be sent under separate cover by
Joseph Correnti, Esquire, local counsel)

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CHECKLIST FOR FILING OF ZONING EXEMPTIONS
PURSUANT TO G.L. c. 40A, § 3**

The following checklist is intended to serve as guidance for persons developing petitions for exemption from a municipal zoning ordinance or bylaw pursuant to G.L. c. 40A, § 3. Petitioners must complete all three parts of the form and submit a copy of the completed form with the petition at the time of filing.

PART 1: GENERAL INFORMATION

Petitioner name:

Description of land or structures for which exemption is sought:

Municipality:

PART 2: CONTENTS OF PETITION

The petition must contain, at a minimum, the following information:

- ☐ A demonstration that the petitioner is a public service corporation that may seek a zoning exemption pursuant to G.L. c. 40A, § 3, with supporting documentation as necessary.
- ☐ A list of the sections of the zoning ordinance or bylaw from which the petitioner seeks an exemption, together with a summary of each such section and an explanation of why exemption from that section is needed, with supporting documentation as necessary.
- ☐ A description of the use of land or structures which are the subject of the exemption request, and an explanation of the purpose of the proposed use.
- ☐ An explanation of the public benefits to be provided by the proposed use of land or structures, with a supporting analysis and a description of the methods used to develop this analysis.
- ☐ A description of alternatives to the proposed use of land or structures, including the use of existing structures or facilities.
- ☐ An analysis of the environmental or other impacts of the use of land or structures, during both construction and operation. This analysis could include, without limitation, impacts on land use at or near the site, on wetlands or water resources at or near the site, visual and noise considerations, traffic and access considerations, public safety considerations, air pollutant emissions, or the use of hazardous substances.
- ☐ A list of all permits required for the proposed use of land or structures prior to construction, during construction and during operation.

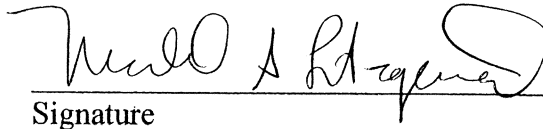
NOTE: All information provided in the petition (including the petitioner's analysis of the need for each exemption sought) must be adopted by witnesses who will be able to testify and respond to questions at evidentiary hearings. Such adoption may occur subsequent to the filing of the petition. The petitioner should be prepared to identify which witness will adopt which part of the petition no later than three weeks after the petition is filed.

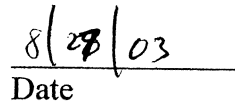
PART 3: ATTACHMENTS

The following documents must be submitted with the petition:

- ☐ An attested copy of the municipality's complete zoning ordinance or bylaw, as in effect at the date of filing.
- ☐ Copies of any zoning decisions or related municipal actions taken with respect to the proposed use of land or structures.
- ☐ A United States Geological Survey map (1:24,000 or 1:25,000 scale and in color) of the area, showing the locus of the land or structures.
- ☐ A diagram of the site of the proposed use, showing property boundaries, existing and proposed structures, and other use areas (e.g., roadway, parking, and materials storage/transfer areas) at the site.
- ☐ Either: (1) documentation that the proposed use does not require the filing of an Environmental Notification Form ("ENF") pursuant to the Massachusetts Environmental Policy Act ("MEPA"); or (2) a copy of the ENF for the project and the Certificate of the Secretary of Environmental Affairs on such ENF. If an Environmental Impact Report ("EIR") is required, and has been submitted to the MEPA Office at the time of filing, a copy of the EIR(s) and any related Certificates also should be submitted with the petition.
- ☐ Draft MEPA Section 61 findings relating to the proposed use of land or structures, if an EIR is required for the proposed use.
- ☐ A draft hearing notice (hard copy and on diskette in WordPerfect 8.0 or higher).
- ☐ Filing fee: A check for \$100.00, made payable to Commonwealth of Massachusetts.

All of the information requested above has been included in the Petition and attachments submitted with this form.


Signature


Date

DRAFT -- FOR DTE REVIEW

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

NOTICE OF ADJUDICATION
NOTICE OF PUBLIC HEARING

D.T.E. 03-____

USGen New England, Inc.

USGen New England, Inc. ("USGenNE" or the "Company"), with offices at 50 Congress Street, Boston, Massachusetts, has filed with the Department of Telecommunications and Energy ("Department") a Petition for Zoning Exemption Pursuant to G.L. c. 40A, §3 and Motion to Defer Consideration of Request for Exemption from Site Plan Review in connection with the Company's proposal to construct and use an Emission Control Plan ("ECP") project (the "Proposed Project") at Salem Harbor Station ("Salem Harbor") as required by the Department of Environmental Protection pursuant to 310 CMR § 7.29.

The Department will review the Company's Petition to determine whether the Proposed Project is reasonably necessary for the convenience and welfare of the public. G.L. c. 40A, § 3. The Department will begin its review process by conducting a Public Hearing to receive public comment on the Proposed Project. **The Public Hearing will be held on _____, beginning at ____ p.m., at _____.** Any person may attend the Public Hearing, and may comment on the Proposed Project.

Description of the Proposed Project

Salem Harbor consists of three primarily coal-fired boilers (designated as Units 1, 2 and 3) and one oil-fired boiler (designated as Unit 4) for a total nominal generating capacity of approximately 755 MW. The Proposed Project is a means for Salem Harbor to comply with 310 C.M.R. § 7.29 (the "7.29 Regulations"). The 7.29 Regulations impose new facility-wide annual emissions limits for nitrogen oxides ("NO_x"), sulfur dioxide ("SO₂"), and carbon dioxide ("CO₂") in units of lb/MWhr, and will result in mercury control requirements.

The following emission control equipment is included in the Proposed Project: (i) one Selective Catalytic Reduction (SCR) unit for the control of NO_x, capable of treating the combined flue gas of Units 1, 2, and 3; (ii) one dry Flue Gas Desulfurization (FGD) and Fabric Filter (FF) system to control the SO₂ emissions from Units 1, 2 and 3; (iii) one Selective Non-Catalytic Reduction ("SNCR") system for the control of NO_x emissions from Unit 4; and (iv) implementation of an ash reduction process (ARP). The ARP will process fly ash in order to reduce the unburned carbon in the ash, and permit the ash to be recycled as a substitute for cement in the concrete manufacturing process. Ancillary structures are expected to include: (i) a 34,000 square foot crane platform; (ii) water tanks and filtration equipment; (iii) a new ignition fuel tank and the relocation of a propane tank; (iv) gas metering equipment; (v) concrete tie blocks; (vi) expansion of the existing 115 kv electrical switchyard; and (vii) two new transformers to serve the emission control equipment. It is anticipated that Keyspan will extend

its existing underground distribution main in Fort Avenue to a new metering station on site to supply a small amount of natural gas for reheating flue gas for the proper operation of the SCR equipment. Water needed to operate the new emission control equipment is expected to be supplied by the South Essex Sewerage District Facility adjacent to the site.

The exact timing of construction is subject to receipt of all other required governmental authorizations, the arrangement of financing for such construction and, potentially, the approval by the U.S. Bankruptcy Court for the District of Maryland (Greenbelt Division), in which the bankruptcy proceeding of USGenNE is now pending.

Further Participation in the Proceeding

Any person who wishes to submit written comments on the Company's Proposed Project may do so by filing an original and three copies of such comments with: Mary L. Cottrell, Secretary, Department of Telecommunications and Energy, One South Station, Boston, Massachusetts 02110, no later than the close of business on [DATE], 2003.

Any person who wishes to participate further in the proceeding must file with Mary L. Cottrell, at the address above, an original and three copies of a written petition to intervene, or a written petition to participate as a limited participant, no later than the close of business on [DATE]. A copy of each petition also must be mailed to regulatory counsel for the Proposed Project, Mary Beth Gentleman, Foley Hoag LLP, 155 Seaport Boulevard, Boston MA, 02210. The Department will review each petition that is filed, and will either grant or deny the petition.

A petition to intervene must satisfy the timing and substantive requirements of 220 C.M.R. § 1.03. Receipt by the Department, not mailing, constitutes filing and determines whether a petition has been timely filed. A late-filed petition may be disallowed as untimely, unless good cause is shown under 220 C.M.R. § 1.01(4).

Company's Publication and Posting Obligations

The Company is ordered to provide notice of the Public Hearing by publishing this Notice (1) at least fourteen days prior to the hearing, in the Salem Evening News and The Boston Herald; and (2) at least seven days prior to the hearing, also in both newspapers.

The Company is ordered to serve a copy of the Notice by certified mail at least fourteen days prior to the Public Hearing on the Mayor of Salem; the Salem City Council; the Salem City Clerk; the Salem Planning Board; and the Salem Zoning Board of Appeals.

The Company is ordered to provide a copy of the Notice to all persons owning real estate abutting the Proposed Project site as they appear on the most recent applicable tax list.

The Company is ordered to post the Notice at Salem City Hall and the Salem Public Library, at least fourteen days prior to the Public Hearing and continuing through the date of the hearing.

The Company is ordered to deposit copies of its Petition and supporting documents for public inspection at the Department's offices and the Salem Public Library. Such copies should be available for public inspection no later than fourteen days before the date of the Public Hearing.

Further Information

Any person who wishes further information regarding this Notice, including information regarding intervention or participation in the proceeding, may contact the Hearing Officer at the address or telephone number below:

Selma Urman, Hearing Officer
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

(617) 305-3525